Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

In Re ALFRED TRENKLER,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: May 14, 2005

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QUESTION PRESENTED FOR REVIEW

Whether the petitioner is entitled to a writ of certiorari (a) where the trial court imposed two illegal life sentences, (b) where the only remedy available to correct the illegal sentences was a petition for mandamus relief, (c) where the First Circuit Court of Appeals ruled that mandamus relief is not available, thereby eliminating the last available safety valve for correcting an illegal sentence, and (d) where the ruling created a split in the circuits on the issue.

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INTRODUCTION

In October 1991, two officers from the Boston Police Department Bomb Squad investigated a suspected bomb in a driveway under an automobile. The device exploded, killing one of the officers and severely injuring the other. The petitioner was subsequently convicted after a jury trial in the United States District Court for the District of Massachusetts of two offenses under 18 U.S.C. § 844 on the theory that he built the device. The trial court imposed concurrent life sentences pursuant to 18 U.S.C. § 34.[1] However, at the time of the petitioner's sentencing, the trial court lacked authority under 18 U.S.C. § 34 to impose a life sentence without first submitting the issue to the jury. After his direct appeal and a number of collateral attacks on his conviction raising unrelated issues, the petitioner filed a petition for a writ of mandamus in the First Circuit Court of Appeals seeking relief from the illegal life sentences. On February 16, 2005, the First Circuit denied the petition, allowing the illegal sentences to stand.

The petitioner respectfully prays for a writ of certiorari to review the judgment of the First Circuit Court of Appeals.

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[1] Thomas Shay, Jr., the person who is alleged to have planted the bomb under his father's car, was tried separately. He received a twelve-year sentence, which he has now completed.

OPINIONS BELOW

On February 16, 2005, the United States Court of Appeals for the First Circuit issued a judgment denying Trenkler's petition for a writ of mandamus. The judgment of the Court of Appeals is reproduced in the Appendix.

JURISDICTION

The United States Court of Appeals had jurisdiction, pursuant to 28 U.S.C. § 1651, to consider a petition for a writ of mandamus. The judgment of the Court of Appeals denying the petition for a writ of mandamus was entered on February 16, 2005. This petition is filed within ninety (90) days of that date. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

18 U.S.C. § 34, as it appeared at the time of the petitioner's conviction in 1993, provided as follows:

> Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by

jury, if the court in its discretion shall so order.

28 U.S.C. § 1651 provides as follows:

> **(a)** The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> **(b)** An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt

hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is

inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory

> authority. Appointment of counsel under this section shall be governed by section 3006A of title 18. A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

> nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

For purposes of this petition, the petitioner will adopt the factual and procedural history set forth in an unpublished decision of the United States Court of Appeals for the Third Circuit, which addressed the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241. *See Trenkler v. Pugh*, 83 Fed.Appx. 468, 469, 2003 WL 22967268 (3rd Cir. 2003). The court accurately summarized the history of the case as follows:

In October 1991, an explosion at the Roslindale, Massachusetts home of Thomas Shay, Sr. killed one Boston Police Bomb Squad Officer and severely maimed another. The police officers had been investigating a suspicious object in Shay Sr.'s driveway, which he reported finding after hearing noises coming from the floorboards of his 1986 Buick Century. Police later arrested two suspects, Trenkler and Thomas Shay, Jr., for their respective roles in the explosion. The two men were indicted by a grand jury and tried separately. At Trenkler's trial, the Government's case was that Trenkler had built the bomb for Shay Jr. to use against his father. *See United States v. Trenkler*, 61 F.3d 45, 48 (1st Cir. 1995). In 1994,[2] Trenkler was convicted of conspiracy in violation of 18 U.S.C. § 371; receipt of explosive materials in interstate commerce with the intent to kill, injure, and intimidate Shay Sr. and cause damage to his property, in violation 18 U.S.C. § 844(d); and attempting to damage and destroy

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[2] In fact, the petitioner was convicted November 29, 1993. *See Trenkler v. United States*, 268 F.3d 16, 18 (1st Cir. 2001).

maliciously, by means of an explosive, Shay Sr.'s car, which was used in interstate commerce, in violation of 18 U.S.C. § 844(i). Trenkler was sentenced to two concurrent terms of life imprisonment for the 844 convictions and one concurrent sixty month term for the conspiracy conviction.[3] (Shay Jr., in contrast, received a 12 year sentence following a plea agreement.)

Since the Court of Appeals for the First Circuit affirmed Trenkler's sentence on direct appeal in 1995, Trenkler has made several unsuccessful post-conviction motions (including a motion for collateral relief under 28 U.S.C. § 2255, which was denied as untimely). *See Trenkler v. United States*, 268 F.3d 16 (1st Cir. 2001). In October 2002, Trenkler filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241, on the ground that the Supreme Court's decision in *Jones v. United States* [529 U.S. 848 (2000)], decriminalized the conduct for which he was convicted and sentenced. In an order dated March 7, 2003, the District Court denied this petition for lack of jurisdiction.

The Third Circuit affirmed the denial of the habeas petition on December 18, 2003, and this Court denied his petition for a writ of certiorari on June 21, 2004. *Trenkler v. Pugh*, ---U.S.---, 124 S.Ct. 2886 (2004).

The petitioner filed a petition for a writ of mandamus in the First Circuit Court of Appeals on August 24, 2004. That petition addressed the issue raised in the instant petition. The First Circuit denied the petition on February 16, 2005.

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[3] Sentencing took place on March 8, 1994.

REASONS FOR ISSUING THE WRIT

I. The Petitioner Is Entitled To A Writ Of Certiorari (A) Where The Trial Court Imposed Two Illegal Life Sentences, (B) Where The Only Remedy Available To Correct The Illegal Sentences Was A Petition For Mandamus Relief, (C) Where The First Circuit Court Of Appeals Ruled That Mandamus Relief Is Not Available, Thereby Eliminating The Last Available Safety Valve For Correcting An Illegal Sentence, And (D) Where The Ruling Created A Split In The Circuits On The Issue

In this case, the trial court imposed two illegal life sentences, a fact not addressed but ultimately not disputed by the Court of Appeals in addressing the mandamus petition. However, the Appeals Court denied the petition "because to allow it would be effectively to negate the stringent gatekeeping restrictions on second or successive [28 U.S.C.] § 2255 petitions." In effect, the court elevated procedure over substance and condemned the petitioner to spend his life in prison notwithstanding the unlawfulness of the two sentences. The safety valves that would have enabled the lower courts to correct these sentences have been methodically removed from the system, and the petitioner's request for mandamus relief was his last chance to rectify what is clearly a grave injustice. By refusing to exercise its discretion on procedural grounds, the Court of Appeals has eliminated the last safety valve and precluded any court from ever correcting the illegal sentences. In doing so, the

court deprived the petitioner of his right to due process under the Fifth Amendment to the United States Constitution and allowed a sentence to stand that violates his Sixth Amendment rights, as well as the prohibition of cruel and unusual punishment set forth in the Eighth Amendment. Moreover, there is a split in the circuits on this issue—in some circuits, a criminal defendant serving an illegal sentence may have that sentence corrected through mandamus proceedings, and in some he may not. Allowance of the petition for a writ of certiorari is appropriate to address these serious constitutional violations as well as to resolve the conflict in the circuits.

A. The Life Sentences Clearly Are Illegal Where, At The Time He Was Convicted, The Relevant Statute Did Not Permit The Court To Impose A Life Sentence Without First Submitting The Issue To The Jury

In this case, the trial court clearly lacked authority to impose life sentences, as opposed to terms of years, without first submitting the issue to the jury. While his prior attorneys certainly share the blame in the imposition of the sentences, he is in the final analysis serving two illegal life terms.

As noted above, on November 29, 1993, the petitioner was convicted of two offenses under 18 U.S.C. § 844, and the trial court imposed concurrent life sentences pursuant to 18 U.S.C.

§ 34. That section currently provides that, "[w]hoever is convicted of any crime prohibited by this chapter [18 U.S.C.S. §§ 31 *et seq.*], which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life." In its current form, the sentencing judge is free to impose a life sentence without constraint. However, prior to its amendment in September of 1994, the language of 18 U.S.C. § 34 permitted the sentencing judge to impose a life sentence or the death penalty after a jury trial *only* "if the jury shall in its discretion so direct[.]" Prior to its amendment in 1994, 18 U.S.C. §§ 844(d) and (i) specifically referenced Section 34 with regard to the imposition of a life sentence.

In the absence of a recommendation from the jury, the District Judge clearly erred under the language of the pre-1994 statutes in imposing two life sentence without first submitting the sentencing issue to the jury. Indeed, "circuit courts considering the application of the pre-1994 versions of 884(i) and 34 have consistently concluded that only a jury had authority to impose a life sentence and that the judge could only impose a sentence for a term of years less than life." *United States v. Grimes*, 142 F.3d 1342, 1352 n.12 (11th Cir. 1998). *See United States v. Tocco*, 135 F.3d 116, 131 (2nd Cir. 1998), *cert. denied*, 523 U.S. 1096 (1998) ("The plain language of this section authorizes the imposition of a life sentence only by jury recommendation in the absence of a plea."); *United States v. Gullett*, 75 F.3d 941, 950-951 (4th Cir. 1996), *cert. denied*, 519 U.S. 847 (1996) (the statutory language did not permit the defendant to be

subject to a life sentence unless the jury so decided.); *United States v. Prevatte*, 16 F.3d 767, 783 and n.16 (7th Cir. 1994) ("we conclude that it was plain error to impose a life sentence without a jury direction"); *United States v. Williams*, 775 F.2d 1295, 1299 (5th Cir. 1985), *cert. denied* 475 U.S. 1089 (1986), *appeal after remand* 819 F.2d 605 (5th Cir. 1987), *reh. denied, en banc* 826 F.2d 12 (5th Cir. 1987) and *cert. denied* 484 U.S. 1017 (1988) (defendant convicted of planting pipe bomb which results in killing may not be sentenced under 18 U.S.C. §§ 34, 844, to life imprisonment in absence of jury recommendation or jury waiver); *United States v. Hansen*, 755 F.2d 629, 631 (8th Cir. 1985), *cert. denied*, 474 U.S. 834 (1985) (holding discretion of district court for sentencing is explicitly limited "in this case by the statute which provides that life imprisonment may be imposed only if death results from the defendant's actions and if the jury directs the imposition of the sentence").

The error was by no means harmless in this case. While the District Judge certainly could have imposed a substantial sentence, that sentence could not have been a *de facto* life sentence and would necessarily have been shorter than the sentence currently in effect. *See United States v. Martin*, 63 F.3d 1422, 1432 (7th Cir. 1995) ("where a legislatively enacted sentencing scheme has expressly deprived a court of the possibility of imposing a life sentence, a sentence for a term of years exceeding the defendant's approximate life expectancy would ordinarily constitute an abuse of discretion."). The petitioner would have been entitled as a matter of law to the imposition of a sentence that was less than his

life expectancy. *Id.* Ultimately, imposition of a life sentence not authorized by law and substantially greater than a lawful sentence violated the prohibition against cruel and unusual punishment set forth in the Eighth Amendment. *See Solem v. Helm*, 463 U.S. 277, 297 (1983).

In addition to the statutory and constitutional grounds set forth above, there are additional grounds that entitled the petitioner to relief from the unlawful life sentence. In the recently decided case of *United States v. Blakely*, 542 U.S. ___, 124 S.Ct. 2531 (2004), this Court addressed a state sentencing system that permitted the judge, in imposing sentence, to find and consider facts other than those found by the jury or admitted by the defendant. *Id.* at ___, 124 S.Ct. at 2537. Applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court found a violation of the Sixth Amendment where the judge relied on factors that should have been left to the jury. *Id.*

This Court has recently held that *Blakely* applies to the Federal system. See *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738, 748-756 (2005). "[T]he relevant sentencing rules [that] are mandatory [] impose binding requirements on all sentencing judges." *Id.* at ___, 125 S.Ct. at 750. If this mandatory requirement is not met then there is a violation of the defendant's Sixth Amendment rights. See *United States v. Blakely*, 542 U.S. at ___, 124 S.Ct. at 2537 (trial court's sentencing of defendant to more than statutory maximum of the standard range for the offense, was deliberate cruelty, violating defendant's Sixth Amendment right to trial by jury).

Where the jurors were never asked to find whether a life sentence was warranted, the sentencing judge exceeded her proper authority by imposing two such sentences and violated the petitioner's rights under the Sixth Amendment. See *United States v. Blakely*, 542 U.S. at ___, 124 S.Ct. at 2537; 18 U.S.C. § 34.

B. Mandamus Was The Only Remedy Available To The Petitioner

Although the various attorneys who have appeared on his case have for the most part represented the petitioner competently as to the issues presented, unfortunately, none identified or raised this issue. Ideally, the illegal sentence should have been addressed at sentencing or shortly thereafter, or at the very least, on direct appeal. *See* 18 U.S.C. § 3742.

In the past, a criminal defendant in these circumstances would have had a number of remedies available to correct an illegal sentence discovered after the direct appeal. Previous versions of Fed. R. Crim. P. 35(a) would have permitted the trial court to correct an illegal sentence at any time. However, prior to the petitioner's sentencing, the rule was amended to require that corrections be made or requested within seven days of the imposition of sentence. In the past, a motion pursuant to 28 U.S.C. § 2255 raising this issue directly or claiming ineffective assistance of counsel could have been brought at any time, but that section now carries a one-year statute of limitation. The elimination of these two safety valves ultimately left a petition

for a writ of mandamus as the only remedy that would have allowed the court to correct an illegal sentence in these circumstances.

Under 28 U.S.C. § 1651 a writ of mandamus may be issued when district court has committed clear abuse of discretion or engaged in conduct amounting to usurpation of judicial power. *See Allied Signal Recovery Trust v Allied Signal, Inc.*, 298 F.3d 263 (3rd Cir. 2002). Mandamus is an extraordinary remedy requiring "(1) a showing of some special risk of irreparable harm, and (2) a demonstration of clear entitlement to the relief requested, i.e., that the district court's order is palpably erroneous." *In re Cambridge Literary Props. Ltd.*, 271 F.3d 348, 348 (1st Cir. 2001), *citing Bennett v. City of Boston*, 54 F.3d 18, 21 (1st Cir. 1995).

A number of circuit courts, including the First Circuit, have held that a writ of mandamus is an appropriate vehicle to direct a federal district judge to correct an erroneous sentence. *See United States v. Patterson*, 882 F.2d 595, 600 (1st Cir. 1989) (dispute as to "the district judge's power to impose the sentence that he did . . . has long been recognized as falling squarely within the narrow range of cases for which mandamus is appropriate"), *citing United States v. Jackson*, 550 F.2d 830, 831 (2nd Cir. 1977). *See also United States v. Martinez-Zayas*, 857 F.2d 122, 127 (3rd Cir. 1988) (failure of district court to impose mandatory prison term on convicted was reviewable on mandamus where statute imposed mandatory sentence); *United States v. Ferri*, 686 F.2d 147, 152 (3rd Cir. 1982) (court of appeals has jurisdiction to review, by way of mandamus,

district court's order reducing sentence because district court was without jurisdiction to reduce sentence), *cert. den.* 459 U.S. 1211 (1983); *United States v. Denson*, 588 F.2d 1112, 1128 n.24 (5th Cir. 1979) (court of appeals is authorized by 28 U.S.C. § 1651 to issue writ of mandamus "to correct the illegal sentences imposed by District Court."); *Garrison v. Reeves*, 116 F.2d 978, 978-979 (8th Cir. 1941) (writ of mandamus is proper to direct federal district judge to correct erroneous sentence).

However, with this decision, the First Circuit broke with other circuit courts, effectively eliminating the right of a criminal defendant ever to request correction of an illegal sentence and eliminating the authority of the courts to correct such a sentence. Not only does the court's holding conflict with the mandamus statute, but it also conflicts with 18 U.S.C. § 3742 (f)(1)[4]. *See United States v. Mejia-Orosco*, 867 F.2d 216 (5th Cir. 1989), adhered to, *reh. den.* (5th Cir. 1989) 868 F.2d 807 *and cert. den.* 492 U.S. 924 (1989) (under 18 U.S.C. § 3742, sentence imposed that is incorrect as a matter of law must be reversed even if reasonable).

In this case, a clear error occurred at sentencing which affected the petitioner's substantial rights as well as the fairness of the

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[4] That section provides, in relevant part, that "[i]f the court of appeals determines that the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate."

proceedings. *See United States v. Mills*, 329 F.3d 24, 29 (1st Cir. 2003); *Id.* By eliminating the only available mechanism for correcting that error and allowing the illegal and unconstitutional life sentences to stand, the Court of Appeals ultimately violated the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees, *Apprendi v. New Jersey*, 530 U.S. at 476, 491-493, as well as the Eighth Amendment's prohibition of cruel and unusual punishment. Especially where other circuit courts have not taken this step, allowance of the instant petition is appropriate.

CONCLUSION

For the reasons stated above, the writ should be granted and the case set down for argument.

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 04-2147

IN RE: ALFRED TRENKLER,

Petitioner.

Before

Boudin, Chief Judge,
Torruella and Lynch, Circuit Judges.

JUDGMENT

Entered: February 16, 2005

Petitioner seeks, through a petition for writ of mandamus, to vacate his two life sentences. We deny the petition for writ of mandamus because to allow it would be effectively to negate the stringent gatekeeping restrictions on second or successive § 2255 petitions. 28 U.S.C. §§ 2255 ¶ 8, 2244(b)(2).

Denied.

By the Court:

Richard Cushing Donovan, Clerk

By: /s/
Chief Deputy Clerk.

[cc. Dana Alan Curhan, Esq., Kevin P. McGrath, AUSA, Dina Michael Chaitowitz, AUSA]